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SECRETARY, BOARD OF
OIL, GAS & MINING

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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH**

IN THE MATTER OF THE)
FIVE-YEAR PERMIT RENEWAL,)
CO-OP MINING COMPANY,)
BEAR CANYON MINE,)
EMERY COUNTY, UTAH)
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**CO-OP'S SUPPLEMENTAL MEMORANDUM
ON ISSUES OF HEARING EXAMINER
AND COLLATERAL ESTOPPEL**

Docket No. 95-025
Cause No. ACT/015/025

Pursuant to paragraph 2 of the October 15, 1997 Stipulation, Motion and Order for Pre-Hearing Scheduling and Discovery Order, Co-op Mining Company (Co-op) respectfully submits this Supplemental Memorandum on the issues of whether a hearing examiner should be appointed by the Board and whether Water Users' objections are barred by collateral estoppel.

To avoid needless duplication, Co-op incorporates by reference all previous arguments made to DOGM and the Board on this issue, and supplements those points and authorities as follows.

ARGUMENT

I. WATER USERS' OBJECTIONS ARE BARRED BY COLLATERAL ESTOPPEL.

In Utah, administrative agencies are required by law to apply collateral estoppel:

Res judicata, often referred to as claim and issue preclusion, prevents the readjudication of issues previously decided. The doctrine is premised on the principle that a controversy should be adjudicated only once. Although initially developed with respect to the judgments of courts, the same basic policies, including

the need for finality in administrative decisions, support application of the doctrine of res judicata to administrative agency determinations. Indeed, the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950. "[T]he principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an administrative proceeding to resolve a controversy over legal rights and to apply a remedy."

Salt Lake Citizens Congress v. Mountain States Tel. & Tel., 846 P.2d 1245, 1251 (Utah 1992).

No less an authority than the United States Supreme Court has repeatedly held that res judicata and collateral estoppel bar relitigation of issues in administrative proceedings such as this. See United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966): "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." In University of Tennessee v. Elliott, 478 U.S. 788 (1985) the Supreme Court also held the decision of a state agency acting in a judicial capacity must be given preclusive effect in all subsequent proceedings:

... [G]iving preclusive effect to administrative factfinding serve the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen v. McCurry*, 449 U.S., at 94, is equally implicated whether factfinding is done by a federal or state agency. ... Accordingly, we hold that when a state agency "acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *Utah Construction & Mining Co.*, *supra*, at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

University of Tennessee, 478 U.S. at 798-799.

Utah courts must necessarily give preclusive effect to the Board's prior findings in any subsequent judicial proceedings. See State v. Sims, 881 P.2d 840, 843 (Utah 1994):

The doctrine of res judicata, which encompasses both claim preclusion and issue preclusion, is designed to prevent the relitigation of issues that have been fully adjudicated. The doctrine applies "when there has been a prior adjudication of a factual issue and an application of a rule of law to those facts. In other words, res judicata bars a second adjudication of the same facts under the same rule of law." [citations omitted]

Collateral estoppel makes a final determination of disputed issues conclusive as to the parties, and operates as a bar to any subsequent litigation of those issues. All state and federal courts and agencies, from the humblest trial court to the U.S. Supreme Court, and including the Board and DOGM, are bound by collateral estoppel to give preclusive effect to the Board's prior adjudications. There is no legal authority for any contrary position. Collateral estoppel is the law in Utah, just as much as is Title 40 of the Utah Code, the enabling legislation for the Board and DOGM. The Board has no more discretion with respect to applying the former than it does the latter. Simply put, the Board is required by law to apply collateral estoppel whenever its elements are met

In Castle Valley Special Service District et al. v. Utah Board of Oil, Gas and Mining, 938 P.2d 248 (Utah 1996), the Utah Supreme Court acknowledged the possibility that the Board's Tank seam Order could indeed collaterally estop Water Users from relitigating in this proceeding any issues resolved by that Order:

Water Users have expressed concern that some of the Board's findings and conclusions would collaterally estop them in the permit renewal hearing, and this appears to be the primary motivation for contesting those findings and conclusions. However, whether the challenged findings would collaterally estop Water Users on any issues in the permit revision proceeding can be decided only in the proceeding in which the issue is raised.

Castle Valley, 938 P.2d at 251. As the Court stated, the Board must now decide if the elements of collateral estoppel are met. If they are, the Board must apply collateral estoppel in this proceeding. It is understandable Water Users would "express concern" that issues resolved by the Board in earlier proceedings may have the ultimate effect of foreclosing their opposition to Co-op's permit renewal, at least to the extent Water Users' objections are based on those specific issues. That simply is not a valid basis for objecting to the application of collateral estoppel. On the contrary, that is the whole intent and purpose for the doctrine's very existence.

In considering whether the elements of collateral estoppel are met here, the Board will do well to consider not only what collateral estoppel does, but what it does not do. While it makes previously resolved issues conclusive and binding on all parties (including the Board) in subsequent

proceedings, it does not otherwise diminish the Board's regulatory authority. See Utah Dept. of Administrative Services v. Public Service Comm'n, 658 P.2d 601 (Utah 1983):

In this case, the principle of *res judicata* assures finality to those provisions of the Commission's order that allocate benefits and establish the parties' rights Specific findings on finality are unnecessary to that result. Conversely, the finality that is inherent in the Commission's performance of the judicial function ... is not compromised by the Commission's simultaneous affirmance of the obvious principle that by doing so it is not relinquishing its regulatory authority over the parties in the performance of those functions that are subject to the jurisdiction of the Commission.

Id., 658 P.2d at 621 Thus, collateral estoppel does not deprive the Board of its jurisdiction, pursuant to applicable statutes or regulations, over claims and parties properly before the Board. It does not nullify the Board's statutory power to rule on Co-op's permit renewal, or to adjudicate any objections thereto. The doctrine simply requires that while acting in an adjudicative capacity, the Board shall not reinvent the wheel. In other words, if the elements of collateral estoppel are met, issues resolved in prior adjudicatory proceedings are conclusively resolved for purposes of future adjudicatory proceedings. In this proceeding, it is therefore true both that the Board has jurisdiction to rule on objections to Co-op's permit renewal, and also that in exercising its jurisdiction, the Board begins by giving preclusive effect to issues previously adjudicated.

Collateral estoppel applies whenever two actions involve the same parties and the same issues, and precludes the relitigation of all issues that were litigated or could have been litigated in the first action. Searle Bros. v. Searle, 588 P.2d 689, 690 (Utah 1978); Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah App. 1987).

Utah has adopted the following test to determine if collateral estoppel applies:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently, fully and fairly litigated?

Searle, *supra*.

The Board's Tank seam Order, affirmed in all respects by the Utah Supreme Court in Castle Valley, 938 P.2d 248 (Utah 1996), is a final judgment on the merits. It involved the same parties as this proceeding, and was competently, fully and fairly litigated. Therefore collateral estoppel conclusively bars the right of Water Users to relitigate any issue resolved by that Order or the Supreme Court's affirmance of that Order.

Those issues that have been previously adjudicated and conclusively resolved, to which collateral estoppel applies, and which may not be revisited in this proceeding, include but are not limited to the following:

- Big Bear Spring is not hydrologically connected to Co-op's permit area.
- Birch Spring is not hydrologically connected to Co-op's permit area.
- As of the date of the Tank seam Order, neither the quantity nor the quality of water at either spring was ever adversely impacted by mining at the Bear Canyon mine.
- As of the date of the Tank seam Order, Co-op's mining operation was designed to prevent material damage to the hydrologic balance outside the permit area.
- As of the date of the Tank seam Order, Co-op's permit application is complete and accurate, and in full compliance with all statutory and regulatory requirements.

Water Users requested a hearing under R645-300-200. They are entitled to a hearing only to the extent they are persons "with an interest which is or may be adversely affected" by DOGM's approval of Co-op's permit renewal. Water Users base their claim to "adversely affected" status on allegations that Co-op's mine operation is hydrologically connected to the springs; that Co-op's mining had detrimentally affected the springs as of the Tank seam hearing and before; and that Co-op's permit application is incomplete and inaccurate for the reasons the argued during the Tank seam hearing. Those are issues previously litigated and resolved against Water Users. Co-op is entitled to an Order from the Board that based on collateral estoppel, in this and any future adjudicative proceeding on Co-op's permit renewal, either before the Board or DOGM, Water Users are not entitled to relitigate those issues, and that while Water Users may be free to object on other grounds, the Board and DOGM will not hear or consider further evidence on those specific issues.

II. WATER USERS' REQUEST FOR A HEARING EXAMINER SHOULD BE DENIED OR SEVERELY RESTRICTED.

Co-op is of the opinion that appointment of a hearing examiner is neither necessary, wise nor warranted, and joins in DOGM's response to Water Users' request for a hearing examiner.

Should the Board nevertheless conclude a hearing examiner is warranted, Co-op requests that any such order specify that the hearing examiner is bound by collateral estoppel, and shall take and report only on evidence not barred by collateral estoppel. Co-op further requests that any hearing examiner be unquestionably qualified by education, training and experience to understand not only all factual issues likely to be presented, but also all legal issues likely to be raised; that he or she be unquestionably unbiased; that his or her education, training, experience and other qualification, as well as any potential biases, be fully disclosed to all parties, and that no person be selected as hearing examiner without the advice and consent of all parties. Co-op further requests that any hearing be on the record and subject to all applicable rules of procedure and evidence, and that the Board review the entire record and make its own independent judgment based on the record as a whole, and not rely solely on the hearing examiner's report.

CONCLUSION

For the reasons stated above, the Board should grant the relief requested by Co-op.

DATED this 14 day of November, 1997.


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CERTIFICATE OF SERVICE

I certify on November 14, 1997 I served the above document by first class mail to:

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A handwritten signature in cursive script, reading "Mark Hansen", is written over a horizontal line.

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